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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-549

ALLIED PILOTS ASSOCIATION, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

No. 74-709

AIR LINE DISPATCHERS' ASSOCIATION, ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, ET AL.

No. 74-710

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. iv-xviii)[1] is reported at 502 F. 2d 453. The opinion

[1] Petitioner Allied Pilots Association filed with the Court an appendix attached to its petition, No. 74-549. Petitioners

and order of the Civil Aeronautics Board approving, upon reconsideration, renewal of the amended Mutual Aid Pact (Pet. App. 225a–270a), and the initial decision of the Administrative Law Judge (Pet. App. 271a–330a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1974. The petition for a writ of certiorari in No. 74–549 was filed on November 6, 1974; the petitions in Nos. 74–709 and 74–710 were filed, pursuant to an extension granted by the Chief Justice on December 6, 1974.

The jurisdiction of this Court is invoked under Section 1006(f) of the Federal Aviation Act (49 U.S.C. 1486(f)) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, in approving renewal of the air carriers' Mutual Aid Pact, as amended, properly determined that the agreement is not adverse to the public interest, pursuant to Section 412(b) of the Federal Aviation Act, 49 U.S.C. 1382 (b), and is consistent with national labor policy and the Railway Labor Act, 45 U.S.C. 151–188.

STATUTES INVOLVED

The relevant sections of the Federal Aviation Act, 72 Stat. 731, as amended, 49 U.S.C. 1301, *et seq.*, and

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Air Line Dispatchers' Association and Air Line Pilots Association, International, filed petitions with a separate appendix, Nos. 74–709 and 74–710. The documents and materials contained in both appendices essentially are identical and, for the Court's convenience, "Pet. App." references are confined to the appendix in Nos. 74–709 and 74–710.

the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, *et seq.*, are set forth in the Appendix to this brief (pp. 15–18).

STATEMENT

Pursuant to Sections 401(k)(4) and 412 of the Federal Aviation Act, 49 U.S.C. 1371(k)(4) and 1382, the Civil Aeronautics Board must assure that cooperative working arrangements among air carriers are consistent with the national labor policy and with the Railway Labor Act, 45 U.S.C. 151–188, are not adverse to the public interest, and are otherwise in accordance with the Federal Aviation Act.

1. In 1958 six certificated air carriers formed a Mutual Aid Pact. This agreement provided financial assistance to a party whose flight operations were shut down by a strike. The strike-bound carrier would receive from the carriers still operating a "windfall" payment equaling their "increased revenues attributable to the strike * * * less applicable added direct expenses" (Pat. App. 7a). The Board approved this agreement in 1959 in *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (Pet. App. 5a–34a), reconsideration denied, 30 C.A.B. 90 (Pet. App. 35a–40a).

In 1960 the carriers applied to the Board for approval of an amendment to the agreement providing that, whenever the windfall payments received by the struck carrier did not amount to 25 percent of its normal operating expenses, supplemental payments totaling that percentage would be made by the other carriers. Each operating carrier would contribute a supplemental payment in proportion to its air transport revenues for the previous calendar year, but in

no case would its supplemental payment exceed one-half of one percent of its air transport revenues for the previous year (Pet. App. 45a). In 1964, after a full hearing, the Board approved the Mutual Aid Pact, as amended, for three more years. *Mutual Aid Pact Investigation*, 40 C.A.B. 559 (Pet. App. 44a–129a).[2]

By 1967 seven carriers were parties to the Mutual Aid Pact. The Board thereupon instituted an investigation to determine whether it should grant continued approval to the Pact and whether it should attach new conditions to approval (Pet. App. 134a–137a). On March 7, 1969, the Administrative Law Judge determined that the Pact was lawful and should be approved without any new conditions (Pet. App. 162a–220a).

Prior to Board review of the Administrative Law Judge's determination, the parties amended the Pact to increase the level of supplemental payments to a struck carrier from 25 percent of its normal operating expenses to 50 percent during the strike's first two weeks, declining weekly thereafter by 5 percent, and leveling off at 35 percent in the fifth and following weeks of the strike. Each carrier's supplemental payment ceiling was increased from one-half of one percent to one percent of its air transport revenues for the previous year (Pet. App. 151a).

[2] During the interval between 1960 and 1964, the agreement remained in effect because, as noted by the Board, "agreements * * * subject to review by the Board under sec. 412 * * * may be made effective among the parties without first being approved by Board order" (Pet. App. 42a, n. 7).

On July 23, 1970, the Board approved the newly amended Pact (Pet. App. 142a–162a). It determined that the prior agreement had had little, if any, impact on labor-management relations (Pet. App. 146a–150a). It also found no evidence indicating that the agreement, as amended, would induce strikes, exacerbate labor-management relations, or create an imbalance in the collective-bargaining process that would threaten the public interest objectives of the Act (Pet. App. 154a). The Board recognized that the increase in supplemental payments would permit substantially greater recoupment of strike losses, particularly during short strikes when maximum benefits were provided, but concluded that carriers would still be induced to avoid strikes (Pet. App. 155a).

Upon petition for reconsideration, the Board vacated its approval and remanded the case for the purpose of gathering a more "fully developed record" on events that had occurred after the close of the earlier hearing (Pet. App. 221a–224a), including the new amendments and two subsequent labor disputes (Pet. App. 230a). Following the Board's order of remand, the carriers adopted an additional amendment, effective January 1, 1971, to permit participation in the Pact by local service carriers (Pet. App. 230a).[3]

2. On March 27, 1972, the Administrative Law Judge determined that the new provisions for increased supplemental payments, increased contributions to fund the supplemental payments, and partici-

[3] Participation in the agreement had been limited to trunk (long haul) carriers.

pation by local service carriers should be disapproved because they created the "real possibility" that a party to the agreement might prolong a strike for short-term benefits to the detriment of the traveling and shipping public, and "heighten[ed] the danger" that airlines contributing to the struck carrier might be weakened financially (Pet. App. 284a). The Administrative Law Judge found the remainder of the agreement to be in substantially the same form as approved by the Board in its 1970 decision, and held that such a cooperative arrangement would not be adverse to the public interest and would not violate national labor policy or the Railway Labor Act (Pet. App. 310a–311a).

On review of the Administrative Law Judge's decision, however, the Board approved the amended agreement in full (Pet. App. 225a–270a). The Board found no evidence that the three new amendments to the Pact so changed the basic nature of the agreement as to make it, unlike its predecessor, adverse to the public interest. Subject to a condition concerning local service carriers,[4] the Board approved the Pact for a renewal period of five years (Pet. App. 232a).

3. On petitions for review, the court of appeals unanimously affirmed the Board's order (Pet. App. iv-xviii). Observing that national labor policy "rests on the principle that parties should be free to marshall the economic resources at their disposal in the resolution of a labor dispute, consistent with the spe-

[4] The condition insured that local service carriers would not receive any increased subsidy for their payments to the Pact.

cific rights and prohibitions established by the labor statutes" (Pet. App. viii), the court held that the Board's approval of the Pact was consistent with national labor policy and the Railway Labor Act (Pet. App. ix–x).[5] The court also found adequate support in the record for the Board's findings that employee welfare was not jeopardized by the Pact (Pet. App. xiii); that the industry was not made more vulnerable to strikes (Pet. App. xiii–xiv); that the Pact did not tend to promote or prolong strikes (Pet. App. xiv–xvi); and that the Pact did not harm economically marginal air carriers (Pet. App. xvi–xvii).

ARGUMENT

1. Petitioners Air Line Pilots Association (ALPA) and Allied Pilots Association (APA) contend that the Mutual Aid Pact unlawfully interferes with the economic relations of air line carriers and their unions in violation of the Railway Labor Act, 45 U.S.C. 151a.[6] The Act, while permitting both sides in a railway labor dispute to resort to economic "self-help" in an attempt to force a settlement most favorable to it, also imposes a duty on employers and employees to bargain in good faith, 45 U.S.C. 152; it recognizes the right of employees to organize without employer interference, *ibid.*; and it establishes certain procedures

[5] The court cited *Kennedy* v. *Long Island R. R. Co.*, 211 F. Supp. 478 (S.D.N.Y.), affirmed, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830, in support of its decision (Pet. App. ix–x).

[6] The Railway Labor Act is made applicable to air carriers by 45 U.S.C. 181 and by Section 401(k)(4) of the Federal Aviation Act, 49 U.S.C. 1371(k)(4).

that first must be followed in order to attempt to resolve disputes through the direct bargaining process, 45 U.S.C. 154–163, 183–185.

As the court of appeals found, the Board's approval of the Pact, as amended, is fully consistent with the labor policy of the Railway Labor Act (Pet. App. x). Contrary to petitioner APA's assertion, the Pact has no tendency to establish industry-wide bargaining or force employees into multi-employer bargaining units: "The terms of the agreement are unrelated to the nature of the bargaining unit, and despite effectiveness of the Agreement since 1958, there has been no transition to industry-wide bargaining" (Pet. App. 240a, n. 14).[7] Moreover, as the court of appeals noted (quoting the Board's findings), " 'the record is replete with evidence of the earnest and consistent good faith efforts of [the Mutual Aid Pact Members] to find a resolution to their strikes throughout the course of difficult labor negotiations' " (Pet. App. ix; 240a–241a). Finally, the Railway Labor Act does not define economic "self-help" so strictly as to exclude various forms of strike insurance, such as the Mutual Aid Pact. Both the Board and court of appeals recognized that "[i]t is not generally given to government agencies to 'regulate what economic weapons a party might summon to its aid' " (Pet App. viii). *National Labor*

[7] Petitioner APA relies upon *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Co.*, 340 F. 2d 690 (C.A. 2), which held that a lockout by employers not in the same bargaining unit as the company being struck violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). But, as the court of appeals noted, the Pact does not have any coercive tendency (Pet. App. x).

Relations Board v. *Insurance Agents' Int'l. Union*, 361 U.S. 447, 490; see *Kennedy* v. *Long Island R.R. Co.*, 211 F. Supp. 478 (S.D.N.Y.), affirmed, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830.[8]

2. Petitioners Air Line Dispatchers' Association (ALDA) and APA contend that the Board improperly considered the Pact's effect upon the balance of bargaining power between air line carriers and their employees as a criterion for determining its acceptability. But this misconstrues the Board's determination.

In appraising agreements among air carriers pursuant to Section 412 of the Federal Aviation Act, 49 U.S.C. 1382, the Board is required to disapprove any agreements found to be "adverse to the public interest." Thus, the Board assessed the Pact's potential impact upon the relative bargaining strength of union and management only to assure that the public in-

[8] In *Kennedy*, the union alleged that the company's strike insurance plan (whose similarity to the air lines' Mutual Aid Pact was expressly noted by the court) violated the Railway Labor Act. The court upheld the plan, reasoning that the Act permits employers to use the economic resources at their disposal, including multi-employer action. The court found further support in Section 20 of the Clayton Act, 29 U.S.C. 52, and Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104, which permit the payment of benefits to parties engaged in a labor dispute. See also *Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Railway Co.*, 384 U.S. 238.

Petitioner ALPA's effort to distinguish *Kennedy* on the ground that multi-employer bargaining is common in the railroad industry ignores the fact that in *Kennedy*, as here, the carrier bargained strictly for itself and was free to take whatever bargaining position it wished. *Kennedy*, *supra*, 211 F. Supp. at 488.

terest would not be jeopardized by any change in bargaining power brought about by the Pact.

Petitioner ALDA asserts that the Board concluded that the Pact was not "adverse to the public interest" because the Pact strengthened the bargaining power of air carriers relative to their employees (Pet. 11). But the Board's conclusion in this regard was based in part upon its findings that, despite this, any such change in bargaining power would not prolong labor disputes, threaten marginal companies, or jeopardize employee welfare. Indeed, petitioners do not dispute the Board's determination that (Pet. App. 234a–235a):

> [T]he employees retain substantial and effective bargaining power regardless of the Mutual Aid Agreement. Thus, the record shows that air carrier wages * * * are higher than, and * * * have increased faster than, wages in other industries, including other transportation industries.

Petitioner ALPA also contends that the Board's analysis should not have been applied to its unique situation as an independent union representing the employees of a single carrier since it has relatively less bargaining power (Pet. 25–28). As we have indicated, however, the Board did not approve the Pact *because* it increased the bargaining power of management; it approved the Pact *despite* its potential effect upon bargaining power. APA's petition contains no basis for distinguishing its bargaining status from that of other air line unions which, although in most cases affiliated with an international organization, also bargain on a single-carrier basis.

3. Petitioners ALDA and ALPA dispute the Board's findings that the Pact, as amended, is not likely to have a serious impact on the willingness of companies to sustain or prolong strikes, and that payments required by the Pact are not likely to affect the viability of small or economically marginal air lines. As the court of appeals found, however, these determinations were supported by substantial evidence on the record (Pet. App. xiv–xvii).[9]

a. Both the Board and the Administrative Law Judge agreed that the record does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid (Pet. App. 232a–233a; 301a). Although the Administrative Law Judge found that the Pact had a *potential* for prolonging and increasing the number of work stoppages, the Board determined that this risk was not substantial in light of the relative infrequency of negotiations in the air lines industry erupting into strikes in years when the new amendments were actually in effect (Pet. App. xv), and the significant financial pressures to settle that remain on the air lines despite their participation in the Pact (Pet. App. 236a).

In assessing the companies' financial position during strikes, the Board found that the Administrative Law Judge had not taken into account post-strike

[9] Federal courts may overturn the Board's findings of fact only if unsupported by substantial evidence on the record. (49 U.S.C. 1486(e)).

losses (the cost of resuming operations, loss of advance bookings, loss of carrier identity in the market), and the loss of normal profits (which the company would have enjoyed had the strike not continued), both of which outweighed any short term benefits attributable to the aid payments (Pet. App. at 238a–239a). As the court of appeals held, the Board's considered judgment on these necessarily speculative costs was based on the "best information available" (Pet. App. xv–xvi).[10]

b. The Board's determination that the Pact does not significantly threaten the financial stability of its members was based in part on the Administrative Law Judge's finding that the record did not "demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended agreement" (Pet. App. 301a). The Board also compared the amounts paid by various air lines under the Pact with the strike losses incurred by members when the new higher payment ceilings were in effect (Pet. App. 243a–244a), and con-

[10] Petitioner ALPA contends that the Board's reliance on carrier estimates of post-strike losses are unreliable. As the court of appeals stated in rejecting this argument, however, ALPA fails to "point to evidence that the * * * [carriers] reached their estimates by misguided or meritricious methods" (Pet. App. xvi). Moreover, as the court of appeals also noted, the Board sought to control the risk of error by limiting its approval of the agreement to a period of five years, thereby insuring that if the estimates prove wrong, they may be corrected (Pet. App. xvi).

cluded that payments were not out of proportion to the gains from the protection offered by the Pact. As the court of appeals held (Pet. App. xvi–xvii), this conclusion was not "unreasonable," since financially weak carriers stand to lose most from strikes or threats of strikes (Pet. App. 245a).

Moreover, the Pact's one-percent ceiling on contributions limits the financial obligation of any air line in the pact in proportion to its operating revenues. Although additional "windfall" payments may increase a carrier's total obligation above the one percent level, the "windfall" payments pose no real burden since they represent profits which the company enjoys solely because of its competitor's strike. The Board so found and the court of appeals agreed (Pet. App. xvii).[11]

4. Finally, petitioner ALPA contends that the Pact violates Section 1 of the Sherman Act, as amended, 15 U.S.C. 1, and may not, therefore, be approved by the Board (Pet. 29–30). ALPA failed to raise this issue before the Board, however, and the court of appeals, relying on Section 1006(e) of the Federal Aviation Act (49 U.S.C. 1486(e)), properly declined to consider

[11] Petitioners' assertion that Pan American World Airways paid large sums to the Pact in recent years but received no benefits because it endured no strikes during this period is irrelevant. As the Board found, every participating carrier (including Pan American) enjoys the benefit of strike insurance (Pet. App. 243a).

the matter. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33.[12]

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1975.

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[12] Approval under Section 412 of the Act (49 U.S.C. 1382) grants antitrust immunity under Section 414 of the Act (49 U.S.C. 1384). *Pan American World Airways* v. *United States*, 371 U.S. 296, 305. The Board may approve an anticompetitive agreement as being not adverse to the public interest under Section 412 of the Act.

Since petitioner did not present its contention of antitrust violation to the Board, and the court of appeals declined to consider the matter, it is not necessary here to discuss the standards which the Board must follow in approving a severely anticompetitive agreement as being in the public interest under Section 412 of the Act.

APPENDIX

Federal Aviation Act

Sec. 412. [72 Stat. 770, 49 U.S.C. 1382] (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transporta-

tion and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

* * * * *

Sec. 414. [72 Stat. 770, 49 U.S.C. 1384] Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

* * * * *

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat 497, 49 US.C 1486]

* * * * *

(e) The findings of facts by the Board or [Secretary of Transportation], if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or [Secretary of Transportation] shall be considered by the court unless such objection shall have been urged before the Board or [Secretary of Transportation] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

Railway Labor Act

TITLE I

Sec. 2. [44 Stat. 577, as amended by 48 Stat. 1186, 62 Stat. 909, 64 Stat. 1238, 45 U.S.C. 151a, 152] The

purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * * * *

TITLE II

Sec. 201. [Added by 49 Stat. 1189, 45 U.S.C. 181] All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the

United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

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